Supreme Court, U.S.
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No. 92-433

In The

Supreme Court of the United States

October Term, 1992

SEARS, ROEBUCK & CO.,

Petitioner,

v.

LOUIS J. BARATTINI, JR.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED FOR REVIEW

1. Did the Fifth Circuit correctly determine that the federal district court had no jurisdiction to hear this personal injury/products liability case when it was removed from the state court more than one year after commencement of the action in violation of 28 U.S.C. § 1446(b)?

2. Did the Fifth Circuit Court of Appeals correctly determine that the doctrine of fraudulent joinder does not apply to a plaintiff who voluntarily dismisses a bona fide non-diverse defendant before trial?

3. Is the Fifth Circuit's fraudulent joinder standard in conflict with the jurisprudence of the Supreme Court of the United States and the other circuit courts or is there any other reason to grant the Petition for Writ of Certiorari?

LIST OF PARTIES IN INTEREST

1. Louis J. Barattini, Jr., plaintiff/respondent
2. Sears, Roebuck & Co., defendant/petitioner
3. Insurance Commissioner of Louisiana as Liquidator of Anglo-American Insurance Co., intervenor

TABLE OF CONTENTS

Page

Issues Presented for Review i

List of Parties in Interest ii

Table of Contents iii

Table of Authorities v

Statement of the Case 2

Argument 6

1. 28 U.S.C. § 1446(b) creates a bright line rule prohibiting removal of a case more than one year after commencement of the action..... 6

Strict Construction of Removal Statutes 6

Retroactivity of 28 U.S.C. § 1446(b) 9

28 U.S.C. § 1446(b) Applies to Barattini 10

2. There can be no fraudulent joinder when a plaintiff adds a non-diverse defendent who has potential liability under state law 10

Definitional Requirements of Fraudulent Joinder 10

No Fraudulent Joinder in Barattini 13

Finding of Proper Joinder Is Res Judicata 15

No Authority for District Court Rule..... 16

3. There is no reason to grant the Petition..... 17

Supreme Court Cases 17

The Circuit Courts..... 21

Other Circuits Support the Fifth Circuit 24

TABLE OF CONTENTS – Continued

Page

Practical Considerations and Congressional Intent 26

The Hidden Agenda 27

Conclusion 27

TABLE OF AUTHORITIES

Page

STATUTES

28 U.S.C. § 1332 7

28 U.S.C. § 1441(a) 22

28 U.S.C. § 1446(b) ..... *passim*

28 U.S.C. § 1447(d) 15

FEDERAL CASES

Abels v. State Farm Fire & Casualty Co., 770 F.2d 26 (3d Cir. 1985) 21, 22

American Dredging Co. v. Atlantic Sea Con, Ltd., 637 F.Supp. 179 (D.N.J. 1986) 23

American Mutual Liability Insurance Co. v. Flintkote Co., 565 F.Supp. 843 (S.D.N.Y.1983) 25

B., Inc. v. Miller Brewing Co., 663 F.2d 545 (5th Cir. 1981) 5, 11, 13, 15, 22

Boyer v. Snap-On Tools, Inc., 913 F.2d 108 (3d Cir. 1990), *cert. denied* 111 S.Ct. 959 (1991) 22, 23, 25

Brown v. Southland Corp., 620 F.Supp. 1495 (E.D.Mo.1985) 26

Bucksnort Oil Co. v. National Convenience Stores, 585 F.Supp. 883 (M.D. Tenn. 1984) 25

Carriere v. Sears, Roebuck & Co., 893 F.2d 98 (5th Cir. 1990) 19

Charest v. Olin Corp., 542 F.Supp. 771 (N.D. Ala.1982) 26

Chesapeake & Ohio Railway v. Cockrell, 232 U.S. 146 (1914) 20

TABLE OF AUTHORITIES – Continued

Page

Chicago, Rock Island & Pacific Railway Co. v. Schwyhart, 227 U.S. 184, 33 S.Ct. 250 (1913) 12

Coker v. Amoco Oil Co., 709 F.2d 1433 (11th Cir. 1983) 11

Ex parte Collett, 337 U.S. 55 (1949) 9

Denver & Rio Grande Western Rail Road Co. v. Brotherhood of Railroad Trainmen, 387 U.S. 556, 87 S.Ct. 1746 (1967) 9

Dodd v. Fawcett Publications, Inc., 329 F.2d 82 (10th Cir. 1964) 24

Fields v. Reichenberg, 643 F.Supp. 777 (N.D.Ill. 1986) 25

Fletcher v. Hamlet, 116 U.S. 408 (1886) 10

Frontier Airlines, Inc. v. United Air Lines, Inc., 758 F.Supp. 1399 (D.Colo.1989) 26

Futurama Import Corp. v. Kaysons International, 304 F.Supp. 999 (D.P.R. 1969) 25

Gravitt v. Southwestern Bell Telephone Co., 430 U.S. 723 (1977) 15

Green v. Amerada Hess Corp., 707 F.2d 201 (5th Cir. 1983), *cert. denied* 464 U.S. 1039 (1984) 7, 22

Greer v. Skilcraft, 704 F.Supp. 1570 (N.D.Ala. 1989) ...3, 9

McCabe v. General Foods Corp., 811 F.2d 1336 (9th Cir. 1987) 11, 26

Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 52 S.Ct. 84 (1931) 11, 20

Morris v. Gilmer, 129 U.S. 315 (1889) 20

TABLE OF AUTHORITIES – Continued

Page

Nosonowitz v. Allegheny Beverage Corp., 463 F.Supp. 162 (1978) 12, 25

Parks v. N.Y. Times Co., 308 F.2d 474 (5th Cir. 1962), *cert. denied* 376 U.S. 949 (1964) 7, 11, 12, 24

Phillips v. Allstate Insurance Co., 702 F.Supp. 1466 (C.D.Cal. 1989) 8

Poulos v. Naas Foods, Inc., 959 F.2d 69 (7th Cir. 1992) 11, 25

Quinn v. Post, 262 F.Supp. 598 (S.D.N.Y. 1967) 13

Rezendes v. Dow Corning Corp., 717 F.Supp. 1435 (E.D.Cal. 1989) 8

Rinehart v. Consolidation Coal Co., 660 F.Supp. 1140 (N.D.W.Va. 1987) 25

Royer v. Harris Well Service, Inc., 741 F.Supp. 1247 (M.D.La. 1990) 8, 9, 10

Saylor v. General Motors Corp., 416 F.Supp. 1173 (E.D.Ky. 1976) 25

Sessions v. Chrysler Corp., 517 F.2d 759 (9th Cir. 1975) 11, 26

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 7

Smoot v. Chicago, Rock Island & Pacific Railroad Co., 378 F.2d 879 (10th Cir. 1967) 24, 26

Wecker v. National Enameling & Stamping Co., 204 U.S. 176 (1906) 19

Willy v. Coastal Corp., 855 F.2d 1160 (5th Cir. 1988) 7

TABLE OF AUTHORITIES – Continued

Page

Wilson v. General Motors Corp., 888 F.2d 779 (11th Cir. 1989) 9

Wilson v. Republic Iron & Steel Co., 257 U.S. 92 (1921) 17, 19

LOUISIANA AUTHORITY

Louisiana Civil Code art. 2315 14

Louisiana Civil Code art. 2317 14

Louisiana Code of Civil Procedure art. 421 9

Brown v. Sears, Roebuck & Co., 514 So.2d 439 (La. 1987) 14

Hill v. Lundin, 256 So.2d 620 (La. 1972) 14

Ross v. La Coste de Monterville, 502 So.2d 1026 (La. 1987) 14

OTHER AUTHORITIES

1A Moore's *Federal Practice* ¶ 0.161[2] (2d ed. 1974) .22, 24

14A C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure* § 3723 (2d ed. 1985) 12

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In its Petition for Writ of Certiorari, Sears, Roebuck & Co. asks the United States Supreme Court to redefine "fraudulent joinder" and to create an exception to the 28 U.S.C. § 1446(b) bright line rule limiting removal to a one-year period. Respondent Louis J. Barattini respectfully requests that the well-established law of removal not be disturbed and that Sears' Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

Louis J. Barattini (a Louisiana resident) was severely injured on August 25, 1987 when a Sears Craftsman 10-inch radial saw, owned by Eric Soileau, lunged forward on its arm and caused an accessory drill bit to shred the top off his right hand. The bit destroyed muscle tissue, shattered the bone in the ring finger, and severed a tendon.

On November 4, 1987, Barattini filed a products liability suit against the manufacturer of the saw, Sears, Roebuck & Co., in the Civil District Court for the Parish of Orleans – a state court. Sears removed the case to the U.S. District Court in the Eastern District of Louisiana, citing the diversity of the parties. However on July 25, 1988, the district court allowed the plaintiff to amend his petition to join Eric Soileau, the owner of the radial saw, as a defendant. Barattini decided to amend his petition at this time because he had discovered in Soileau's April 28, 1988 deposition a negligence cause of action which offered greater tactical flexibility than the strict liability cause of action which he had previously known about. Inasmuch as Soileau is a Louisiana resident, the district court then remanded the case to state court on July 27, 1988. It was understood at the time of remand that all discovery conducted under the auspices of the federal court could be used in the state court action. Among the discovery conducted was the April 28, 1988 deposition of Soileau.

Prosecution of the case was delayed when the intervening worker's compensation carrier, Anglo-American Insurance Co., went into liquidation and filed a Motion

and Order to Stay Proceedings. Not until January 11, 1991 did counsel enroll for the Insurance Commissioner of Louisiana in its capacity as the liquidator of Anglo-American Insurance Co. At that point, plaintiff and defendant Sears sought to set the case for trial. The trial court refused to schedule a trial date until Eric Soileau answered the Petition for Damages. Sears filed a pleading styled "Motion To Compel Plaintiff To Enter Default Judgment Against Defendant, Eric Soileau, Or Alternatively, Dismiss All Claims Against Eric Soileau In Order That This Matter Might Be Set For Trial." (R.164).

Although Soileau was a bona fide defendant under Louisiana law, he had no insurance and no money to pay a judgment. He could not afford to pay an attorney to answer the petition. The plaintiff decided to dismiss Soileau *without prejudice*, relying on the plain language of 28 U.S.C. § 1446(b) to protect his choice of forum. It should be noted that this amendment to the removal statute became effective on November 19, 1988 and changed the law on removal by reason of diversity.[1]

This was the moment that Sears was waiting for. Despite the fact that the parties were seeking a trial date in state court, Sears removed the case to federal court again and opposed plaintiff's motion to remand with the claim that the one-year limitation period did not apply because the plaintiff had engaged in "fraudulent joinder."

A few days before the hearing on the motion to remand, Sears took what purported to be a "statement"

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[1] *Greer v. Skilcraft*, 704 F.Supp. 1570 (N.D.Ala. 1989).

by Soileau concerning Barattini's alleged "lack of intention to seek a judgment against him." Since Barattini had no notice of this secret deposition, Sears was able to ask leading questions, put words into Soileau's mouth, and seek admission of legal conclusions that Soileau was not competent to address. Nothing in the Soileau transcript suggests that Barattini told him not to hire a lawyer or that Barattini made secret covenants with him. Although Soileau said that Barattini did not expect to collect any money from him, this statement does not mean that Barattini did not intend to pursue a judgment. The transcript further shows that Sears quickly supplied its own desired answers whenever Soileau expressed uncertainty or lack of recollection.[2]

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[2] For example, the following exchange can be found on pp. 17a and 18a of Sears' Petition:

Q: You said he did not intend on pursuing the claim against you. Can you tell me the substance of that conversation?

A: That's been a long time.

Q: Well, basically what he told you about why he didn't want to pursue you?

A: I think it was that the suit wasn't going against me. It was going to be against Sears.

Q: So he mentioned that they were going to proceed against Sears and just have you in the suit in name only?

A: I guess that's what it was.

. . . .

Q: Do you remember what you all [Soileau and Barattini] talked about when you received the suit papers?

A: I think he said I didn't have to worry about it. If I remember right, I think that's what he said.

The district court denied plaintiff's motion to remand, finding that Barattini "had used the letter of the law to defeat the substance of the law" and that plaintiff was flaunting 28 U.S.C. § 1446(b).[3] Since this was not an appealable judgment, the plaintiff had no choice but to go to trial.[4] After the trial, the district court entered a judgment against the plaintiff, dismissing its claim against Sears.

The plaintiff appealed from this judgment. The United States Court of Appeals for the Fifth Circuit agreed with Barattini that the federal courts did not have jurisdiction over this case, vacated the judgment, and remanded to state court. In reaching this conclusion, the Fifth Circuit held that the plain language of 28 U.S.C. § 1446(b) would appear to bar removal of the case by Sears. The Fifth Circuit further held that joinder of Eric Soileau as a defendant was not "fraudulent" within the meaning of the well-established removal jurisprudence. It therefore did not consider whether it should create a judicial exception to the one-year removal bar. The Fifth Circuit found that publication of its per curiam opinion was unnecessary under Local Rule 47.5.[5] Finally, the Fifth

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Q: And do you know what he meant by you don't have to worry about it?

A: That they wasn't after any money from me.

[3] Not knowing that 28 U.S.C. § 1446(b) would be enacted after he added the non-diverse defendant, Barattini could not have intended to use the new rule to "beat the system."

[4] *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981).

[5] "The publication of opinions that have no precedential value and merely decide particular cases on the basis on well-established law imposes needless expense on the public

Circuit made a point of discrediting the Soileau "statement": "Any interpretation of Soileau's words as evidence of a collusive agreement is quite a stretch in light of the leading questions and lack of cross examination." *See* p. 9a of Sears' Petition.

Sears asks the U.S. Supreme Court to exercise its discretionary powers to review this opinion of the Fifth Circuit. Barattini asks the Court to deny certiorari because the law of removal and fraudulent joinder is well-settled and because there is no reason to rewrite the law according to Sears' specifications.

ARGUMENT

1. 28 U.S.C. § 1446(b) Creates a Bright Line Rule Prohibiting Removal of a Case More than One Year After Commencement of the Action.

Strict Construction of Removal Statutes

Congress and the U.S. Supreme Court have always required the strict construction of statutes concerning removal.

> Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of federal courts on removal, but the policy of the successive acts of Congress

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and burdens on the legal profession." Rule 47.5 of the United States Court of Appeals for the Fifth Circuit. It is interesting to note that the Fifth Circuit already has more modern fraudulent joinder cases than any other circuit court and is frequently cited by the district courts in other circuits.

> regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09, 61 S.Ct. 868, 872, 85 L.Ed. 1214 (1941); *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988). Three principles mandate this policy: (1) limited federal jurisdiction, (2) comity with the state courts, and (3) the right of the plaintiff to prosecute his own suit in his own way. *Green v. Amerada Hess Corp.*, 707 F.2d 201, 206 (5th Cir. 1983), *cert. denied* 464 U.S. 1039 (1939); *Parks v. N.Y. Times Co.*, 308 F.2d 474 (5th Cir. 1962), *cert. denied* 376 U.S. 949 (1964).

Before passing the 1988 Judicial Improvements and Access to Justice Act, Congress initially considered total elimination of diversity jurisdiction. Although this extreme step was not taken, Congress did make some changes to reduce the number of diversity cases that would be adjudicated in the federal courts. 28 U.S.C. § 1332(a)-(c). The language added to 28 U.S.C. § 1446(b) has a similar effect:

> A case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

1988 U.S. Code Cong. & Adm. News 5982 indicates that the result of this amendment "is a modest curtailment in access to diversity jurisdiction." *Id.* at 6032. In commentary published in the U.S. Code Annotated (West 1992), David D. Siegel explains that this rule is "just as sensitive and demanding in its way as a *statute of limitations*" (emphasis supplied).

Judicial interpretation of the rule has, in fact, followed the policy of strict construction, treating 1446(b) as a bright line rule rather than an invitation to a case-by-case application. In *Rezendes v. Dow Corning Corp.*, 717 F.Supp. 1435 (E.D.Cal. 1989), for example, the court remanded to state court an action that was filed in 1987 and not served until 1989. The *Rezendes* Court explained that Congress did not amend the removal statute so as to give federal courts discretion to allow removal of diversity actions more than one year old. "Rather Congress has clearly expressed its intent in the plain language of 28 U.S.C. § 1446(b) that a diversity case which has been before a state court for more than one year should stay there." *Id.* at 1438. Responding to the defendant's warning that plaintiffs could manipulate their cases, the *Rezendes* Court further explained: "Contrary to defendant's argument, Congress apparently *did* envision that plaintiffs seeking to avoid removal from state court would have the ability to prevent removal of actions based upon diversity." *Id.* at 1439 n. 3. *See also Phillips v. Allstate Insurance Co.*, 702 F.Supp. 1466 (C.D.Cal. 1989).

Similarly, in *Royer v. Harris Well Service Inc.*, 741 F.Supp. 1247 (M.D.La. 1990), the district court remanded a personal injury case that was filed in 1984 against Harris Well Service and Shell Oil even though a state court created diversity when it ruled in 1989 that Harris had tort immunity under the Worker's Compensation Act. The *Royer* Court found that 28 U.S.C. § 1446(b) placed a one-year limitation on removal of diversity cases.

Retroactivity of 28 U.S.C. § 1446(b)

It is well established that changes in procedure are applied to pending litigation "absent some contrary indications by the Congress and absent any procedural prejudice to either party." *Denver & Rio Grande Western Rail Road Co. v. Brotherhood of Railroad Trainmen*, 387 U.S. 556, 563, 87 S.Ct. 1746, 1750 (1967). According to the Supreme Court, "No one has a vested right in any given mode of procedure." *Ex parte Collett*, 337 U.S. 55, 71, 69 S.Ct. 944, 953 (1949).

Because of this principle of retroactivity, almost all courts have retroactively applied 28 U.S.C. § 1446(b) to cases pending in the state courts on November 19, 1989, the date of the statute's enactment. *Wilson v. General Motors Corp.*, 888 F.2d 779 (11th Cir. 1989); *Greer v. Skilcraft*, 704 F.Supp. 1570 (N.D.Ala. 1989) (*en banc*); *Royer v. Harris Well Service, Inc.*, 741 F.Supp. 1247 (M.D.La.1990).

> Removal of diversity cases to federal court, while stemming from a constitutional source, is basically a matter of procedure, and is dependent on the scope of Congressional enactments. Removal affects the forum where a dispute is to be resolved, not the substantive merits of a dispute. Indeed, the federal court after removal would be obliged to apply the same substantive rules of decision which the state court is to apply.

Greer, 704 F.Supp at 1579-80.

Since 28 U.S.C. § 1446(b) provides that a case may not be removed more than one year after *commencement* of the action, it should be noted that the case commences when the original complaint is filed. LSA-C.C.P. art. 421; *Royer*.

If an amended complaint changes the essential character of a lawsuit, then the commencement would be the date of filing of the amended complaint. *Fletcher v. Hamlet*, 116 U.S. 408, 6 S.Ct. 426, 29 L.Ed. 679 (1886).

28 U.S.C. § 1446(b) Applies to Barattini

As in *Royer* and the other cited cases, Barattini's cause of action accrued before the effective date of this amendment. The original lawsuit was filed on November 4, 1987 and the amended lawsuit was filed on July 27, 1988. The amended lawsuit did not change the essential character of the action; it was still an action based on personal injury. The only difference was that a second defendant was added. However, whether the first or the second date is considered the "commencement" of the action, the removal undertaken by Sears came more than a year later on March 5, 1991 – 39 months after the first date and 32 months after the second date.

Under either analysis, 28 U.S.C. § 1446(b) should be applied to Barattini.

2. There Can Be No Fraudulent Joinder When a Plaintiff Adds a Non-Diverse Defendant Who Has Potential Liability Under State Negligence and Strict Liability Law.

Definitional Requirements of Fraudulent Joinder

"Fraudulent joinder" is a term of art. It means one of two things: (1) a plaintiff has added a defendant against whom he has no possible cause of action or (2) a plaintiff

has lied in his jurisdictional allegations. *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183, 52 S.Ct. 84 (1931); *Parks v. N.Y. Times Co.*, 308 F.2d 474 (5th Cir. 1962); *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981); *Coker v. Amoco Oil Co.*, 709 F.2d 1433 (11th Cir. 1983); *McCabe v. General Foods Corp.*, 811 F.2d 1336 (9th Cir. 1987); *Sessions v. Chrysler Corp.*, 517 F.2d 759 (9th Cir. 1975); *Poulos v. Naas Foods, Inc.*, 959 F.2d 69 (7th Cir. 1992).

Although fraudulent joinder may be committed in an effort to prevent diversity jurisdiction, the converse is not true. Every effort to prevent diversity jurisdiction does not result in fraudulent joinder. The Supreme Court has held that the motives of the plaintiff in joining a party are absolutely irrelevant:

> In a removal proceeding, the motive of the plaintiff in joining defendants is immaterial, provided there is in good faith a cause of action against those joined.
>
> It has been uniformly held that, where there is a prima facie joint liability, averment and proof that the resident and nonresident tortfeasors are jointly sued for the purpose of preventing removal does not amount to an allegation that the joinder was fraudulent and will not justify a removal from state court.

Mecom v. Fitzsimmons Drilling Co., 52 S.Ct. 84 (1931). Even if a defendant is judgment-proof, the courts will not examine the motives of the plaintiff.

> [T]he motive of the plaintiff, taken by itself, does not affect the right to remove. If there is a joint liability, [the plaintiff] has an absolute right to enforce it, whatever the reason that makes

> him wish to assert the right. Hence the fact that the [diversity defendant] is rich and the [non-diversity defendant] poor does not affect the case.

Chicago, Rock Island & Pacific Railway Co. v. Schwyhart, 227 U.S. 184, 193, 33 S.Ct. 250, 251 (1913). To the extent that the courts even mention the "intent" of the plaintiff to pursue a judgment, the standard of evaluation is an objective one:

> There can be no fraudulent joinder unless it be clear that there can be no recovery under the law of the state on the cause alleged, or on the facts in view of law as they exist when the petition to remand is heard. One or the other at least would be required before it could be said that there was no real intention to get a joint judgment, and that there was no colorable ground for so claiming.

Parks, 308 F.2d at 478. This Fifth Circuit's objective interpretation of "intention" is supported by Sears' co-counsel, Professor Arthur Miller, in his treatise on federal procedure:

> A party will be considered fraudulently joined when plaintiff has not stated a claim for relief or does not intend to secure a judgment against that defendant. But there need be only a possibility that a right to relief exists to avoid this conclusion, and plaintiff's ultimate failure to obtain a judgment is immaterial. [F]raud is a term of art.

14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3723 (2d ed. 1985). *See also Nosonowitz v. Allegheny Beverage Corp.*, 463 F.Supp. 162 (S.D.N.Y. 1978):

> Whether the joinder is fraudulent or not is said to depend on whether the plaintiff really intended to judgment against the resident defendants. That intent is measured by objective indices.

Id. at 163. Similarly, *Quinn v. Post*, 262 F.Supp. 598, 603 (S.D.N.Y. 1967) has explained that a "joinder is fraudulent if the allegations . . . with respect to the defendant are shown to be so clearly false and fictitious that no factual basis exists for an honest belief [in] . . . liability."

In a case involving alleged fraudulent joinder, the court must evaluate all factual allegations and all contested issues of substantive law in the light most favorable to the plaintiff. On review, the court of appeals does not defer to the findings of the district court but determines for itself if there was proper joinder. The party seeking removal from state to federal court has a heavy burden in establishing federal jurisdiction and in proving that there is fraud on the part of the plaintiff. *B. Inc. v. Miller Brewing Co.* 663 F.2d 545 (5th Cir. 1981).

No Fraudulent Joinder in Barattini

Despite its general condemnation of Barattini, Sears has never alleged that he fraudulently pleaded the residence of the second defendant, Eric Soileau. As indicated in the Amended Complaint and on the cover page of the ex parte deposition taken by Sears, Mr. Soileau was at all material times a resident of Destrehan in St. Charles Parish, State of Louisiana. Of the two possible ways of establishing fraudulent joinder, fraudulent pleading of jurisdictional facts does not apply.

Nor did Barattini attempt to join a defendant against whom he had no cause of action. He had, in fact, two causes of action against Eric Soileau. The first cause was known from the beginning: Soileau was liable as the owner of a defective thing under LSA-C.C. art. 2317; *Brown v. Sears, Roebuck & Co.*, 514 So.2d 439 (La. 1987); *Ross v. La Coste de Monterville*, 502 So.2d 1026 (La. 1987).

The second cause of action became apparent in Soileau's April 28, 1988 deposition in which he stated that there had been a warning sign on the table saw when he purchased it, but it had fallen off and he had neglected to replace it. If a jury found under Louisiana's duty-risk analysis that this negligence was a proximate cause of Barattini's injury, then he would have been liable under LSA-C.C. art. 2315; *Hill v. Lundin*, 256 So.2d 620 (La. 1972).

The two alleged causes of actions are not novel, impossible or far-fetched. They are standard personal injury causes of action precluded by no worker's compensation or other immunity. The factual underpinnings are supported by Soileau's April 28, 1988 deposition and the theories of liability are clearly delineated in the Amended Complaint:

> Defendant, Eric Soileau, shared in the fault, negligence, and/or strict liability of Sears in the following respects:
>
> a) Having Garde over a defective and dangerous instrumentality.
>
> b) Failing to warn Louis Barattini of the hazards attendant to the use of the saw.

c) Failing to replace a warning sign that fell off the saw.

d) Any and all other acts of negligence, fault, and/or strict liability which may be discovered at the trial of this matter.

Under these circumstances, remand by the district court was appropriate. After making sure that plaintiff had a bona fide cause of action against Soileau and ordering that plaintiff amend his complaint within one week to make these allegations, the district court then sent the case back to state court as directed by mandatory language in the Fifth Circuit jurisprudence:

> If there is even a possibility that a state court would find a cause of action stated against . . . the in-state defendant on the facts alleged by the plaintiff, then the federal court *must* find that the in-state defendant [has] been properly joined, that there is incomplete diversity, and that the case *must* be remanded to the state courts.

B. Inc., 663 F.2d at 550.

Finding of Proper Joinder Is Res Judicata

The July 27, 1988 decision of the district court to allow joinder of Eric Soileau and to remand to state court is not reviewable by the court of appeal or the district court. 28 U.S.C. § 1447(d); *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977); *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545 (5th Cir. 1981). It became the law of the case and it was error for the district court to re-open that issue in its April 24, 1991 hearing.

No Authority for District Court Rule

Barattini further suggests that its representations to the district court in 1988 were truthful. He intended to prosecute the case against Soileau and would not have dismissed him from the suit without prejudice if a change in the procedural law – 28 U.S.C. § 1446(b) – had not invited him to do so. When the decision to dismiss was made on the advice of Barattini's expert (so as not to distract from the stronger case against Sears) and in the face of economic realities (Soileau had no insurance and no money to hire an attorney to answer), it was a strategic decision made on the eve of trial – the kind of decision that attorneys make constantly and which are neither fraudulent nor unethical.

To confuse trial tactics with fraudulent joinder is something authorized by no statute or jurisprudence. No case has been cited in memorandums or in the April 24, 1991 Minute Entry which justifies a two-years-later finding of fraudulent joinder when a bona fide non-diverse party is dismissed from a suit without prejudice by a plaintiff.

The district court speaks of "blatant attempts to circumvent the federal court's exercise of diversity jurisdiction," forgetting that plaintiffs have historically been allowed to prevent removal to federal court as long as their joinder of parties was not "fraudulent" and that the Supreme Court has always taught that the *motive* for joinder of a non-diverse party is immaterial.

Sears offers a new definition of fraudulent joinder for the consideration of This Honorable Court:

> [A] district court may properly disregard a defendant who would not otherwise be a defendant but for the plaintiff's desire to defeat diversity.

Petition at p. 14. With all due respect to the distinguished counsel recruited by Sears to argue its case, Barattini must point out that the Sears Rule of Fraudulent Joinder has been enunciated by no court in the United States. Barattini respectfully asks the Court to reject this effort by Sears to rewrite the rules of federal diversity jurisdiction.

3. There Is No Reason To Grant The Petition For Certiorari

Sears has failed to show any special or important reasons why the U.S. Supreme Court should grant its petition. Sears misstates the well-established law of the Supreme Court and presents an incomplete and distorted view of the cases in the other circuits. Trying to manufacture an appearance of conflict among the circuits, Sears neglects to mention that virtually every circuit has cited the Fifth Circuit fraudulent joinder jurisprudence with approval. A case by case review, while tedious, will reveal the emptiness of Sears' argument and show no support for the Sears Rule of Fraudulent Joinder. A sampling of cases from other circuits will then demonstrate that the Fifth Circuit has been cited with approval throughout the country.

Supreme Court Cases

Sears claims that *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921) stands for the proposition that fraudulent joinder exists because a plaintiff does not intend to

prosecute a case in good faith. Sears further claims that the bad faith of Wilson was the reason that the Supreme Court did not consider whether the Alabama law governing this case would provide a cause of action against the defendant.

Sears' discussion ignores the facts in the case and the Supreme Court analysis. What really happened was that Wilson (an Alabama resident) sued his employer (a New Jersey corporation) and a co-worker (an Alabama resident) for an injury that he sustained on the job. The employer sought removal on the grounds that the co-worker was not present when the accident occurred and did nothing to cause the accident. Because of the plaintiff's failure to traverse the employer's fraudulent joinder allegations, the Supreme Court had to hold that there was no factual basis for making the co-worker a defendant. Thus, the Supreme Court did not have to make an inquiry as to whether Alabama law would recognize a cause of action against a co-worker. It was the failure of the factual underpinnings that demonstrated fraudulent joinder. It was not a lack of intent to prosecute, in and of itself, that created fraudulent joinder.

Here are the words of the Supreme Court with emphasis added to the appropriate phrase:

> As the joinder was a sham and fraudulent – *that is, without any reasonable basis in fact* and without any purpose to prosecute the cause in good faith against the co-employee. . . .

Id. at 98 (emphasis supplied). It is important to note the use of the word "and" in this passage. An alleged lack of

intention to prosecute is not sufficient by itself to create fraudulent joinder.

The facts in the *Wilson* case can be distinguished from the facts in the Barattini case. Louis Barattini had a viable cause of action against Eric Soileau under the facts and the law of Louisiana. Sears' attempt to apply *Wilson* to Barattini is as misleading as its statement that the Fifth Circuit would undoubtedly remand *Wilson* if it were called upon to review the case today. In *Carriere v. Sears, Roebuck & Co.*, 893 F.2d 98 (5th Cir. 1990), *cert. denied* 111 S.Ct. 60 (1991), after holding that the plaintiffs had no factual basis for asserting a cause of action against various non-diverse defendants, the Fifth Circuit did not hesitate to find fraudulent joinder and to affirm federal jurisdiction over the case.

Similarly, Sears misrepresents the holding in *Wecker v. National Enameling & Stamping Co.*, 204 U.S. 176 (1906). Conrad Wecker (a Missouri resident) sued his employer and two co-workers for his job-related injuries. The court found that one co-worker was a resident of Illinois who had not been served and the other co-worker was a mere clerical worker with no responsibility for the conditions causing the plaintiff's injury. Because the non-diverse defendant had no factual connection with the case, the court refused to remand.

Sears is correct in stating that the district court can "pierce the pleadings" to determine whether joinder is fraudulent, but this case shows that the reason for the scrutiny of the affidavits and other evidence was to determine whether the plaintiff had support under the law and

the facts for his cause of action. When the court determined that the factual underpinnings were deficient, it concluded that the plaintiff had wrongfully joined the non-diverse defendant just to be able to defeat federal diversity jurisdiction. On the other hand, if the plaintiff had joined a defendant against whom he had a viable cause of action, the court would not have interfered with his choice of forum.

Sears goes far afield in citing *Morris v. Gilmer*, 129 U.S. 315 (1889) for the proposition that the court must examine the "intentions" of the plaintiff. *Gilmer* concerns the "intention" of Morris to change his domicile from Alabama to Tennessee rather than the intention of Morris to pursue a judgment against a bona fide non-diverse defendant. Instead of *Gilmer*, Sears should have been examining *Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931) in which the Supreme Court explained that the naming of a Louisiana administrator by the estate of an Oklahoma man in order to defeat federal jurisdiction was not fraudulent.

> It has been uniformly held that, where there is a prima facie joint liability, averment and proof that resident and nonresident tortfeasors are jointly sued for the purpose of preventing removal does not amount to an allegation that the joinder was fraudulent, and will not justify a removal from the state court.

Id. at 189. Further, Sears should have read *Chesapeake & Ohio Railway v. Cockrell*, 232 U.S. 146 (1914) more carefully. *Chesapeake* clearly shows that bad faith means joining a defendant when there is no reasonable basis to support the cause of action against him:

> [T]his right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy.
>
> . . . .
>
> Of course, [the plaintiff's claim against the railway employee] *was not [merely a fraudulent device to prevent removal] unless it was without any reasonable basis.*

Id. at 152-53.

The Circuit Courts

Sears cites two cases from the Third Circuit and two cases from the Tenth Circuit, claiming that their fraudulent joinder jurisprudence is in conflict with that of the Fifth Circuit. A careful reading of these cases destroys this claim.

Abels v. State Farm Fire & Casualty Co., 770 F.2d 26 (3d Cir. 1985) recommends a two-part analysis for determining whether a fictitiously named defendant can defeat diversity jurisdiction. Part of this analysis concerns "indicia of fraudulent joinder" such as a failure to seek the actual names of the defendants, a failure to join the John Does, or a failure to serve them. However, *Abels* carefully limits its guidelines to John Doe cases. The court can determine for itself whether a plaintiff has a viable state law claim against a known defendant, but it cannot determine whether a fictitiously named defendant is anything but a phantom unless the plaintiff actually does something to bring the true identity to light. Recognizing the qualitatively different problems that fictitiously named defendants have caused in certain circuits, Congress has

since *Abels* amended 28 U.S.C. § 1441(a) to curtail the practice.

The rules outlined for the John Doe cases do not apply to ordinary diversity cases. Nor do they serve as a basis for claiming that the Third Circuit is in conflict with the Fifth Circuit. As *Abels* emphasizes, "The fact that the plaintiffs' motive for joining a John Doe is to defeat diversity is not considered indicative of fraudulent joinder." *Id.* at 98. Moreover, the second case cited by Sears, *Boyer v. Snap-On Tools, Inc.*, 913 F.2d 108 (3d Cir. 1990), *cert. denied* 111 S.Ct. 959 (1991) cites both *Abels* and a whole series of Fifth Circuit cases with equal approval and no apparent contradiction. The *Boyer* analysis parallels the Fifth Circuit analysis:

> [W]e note first that there is no suggestion by defendants that plaintiffs have falsely alleged their Pennsylvania citizenship or that of Baldwin and Kaiser. In other words, this is not a situation where "there has been outright fraud in the plaintiff's pleadings of jurisdictional facts." *B., Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir. 1981); *see Green v. Amerada Hess Corp.*, 707 F.2d 201, 205 (5th Cir. 1983), *cert. denied* 464 U.S. 1039 (1984).
>
> Second, this is not a case where the action against the individual defendants is defective as a matter of law. *See* 1A *Moore's Federal Practice* ¶ 0.16[2] at 274 ("The joinder may be fraudulent if the plaintiff fails to state a cause of action against the resident defendant and the failure is obvious according to the settled rules of the state").

Boyer does not inquire into the subjective intent of the plaintiffs to pursue a judgment. In fact, it mandates remand "if there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants." *Id.* at 111. Finally, the Third Circuit states that the plaintiffs have the right to structure their complaint in any way that they desire even if the naming of defendants has repercussions on jurisdiction. The federal rules forbid only the collusive joining of parties to create federal jurisdiction – not the naming of parties from whom one cannot collect money in order to defeat jurisdiction.

> As the commentary in the highly regarded *ALI Study of the Division of Jurisdiction between State and Federal Courts* (1969) notes, "there is a qualitative difference between a device designed to invoke federal jurisdiction and one designed to avoid it. In the former instance, the already over-burdened federal courts are being asked to adjudicate a case that, in the absence of the device, would fall outside their statutory and perhaps their constitutional competence. In the latter, if the device succeeds, a case depending on state law merely remains in the state court."

Id. at 111.

Other Third Circuit cases, such as *American Dredging Co. v. Atlantic Sea Con, Ltd.*, 637 F.Supp. 179 (D.N.J. 1986) cite Fifth Circuit cases with approval and emphasize that "fraudulent joinder" is a term of art.

> In this context, the term "fraudulent joinder" does not require a showing of fraud in the conventional sense; it in no way reflects on the integrity of plaintiff or plaintiff's counsel. . . .

> The standard . . . has been articulated by Professor Moore in the following manner: . . . .
>
> If, however, there is a real possibility that the plaintiff has stated a cause of action, the joinder is not fraudulent, and the case should be remanded. 1A Moore's Federal Practice ¶ 0.16[2].

Sears' claim that the Tenth Circuit standard for fraudulent joinder conflicts with the Fifth Circuit standard is just as false as the claim about the Third Circuit. *Dodd v. Fawcett Publications, Inc.*, 329 F.2d 82 (10th Cir. 1964) holds simply that the joinder of a defendant against whom no cause of action is stated is a sham. *Smoot v. Chicago, Rock Island & Pacific Railroad Co.*, 378 F.2d 879 (10th Cir. 1967) offers the same holding and even cites a Fifth Circuit case as its authority: *Parks v. New York Times Co.*, 308 F.2d 474 (5th Cir. 1962).

Other Circuits Support The Fifth Circuit

To drive home his point that the Fifth Circuit fraudulent joinder jurisprudence is not contrary to the jurisprudence of any other circuit, Barattini offers the following partial list of cases that have cited the Fifth Circuit with approval or followed guidelines similar to those of the Fifth Circuit:[6]

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[6] Cases that do not actually cite the Fifth Circuit cases are marked with an asterisk.

First Circuit

Futurama Import Corp. v. Kaysons International, 304 F.Supp. 999 (D.P.R. 1969)

Second Circuit

American Mutual Liability Insurance Co. v. Flintkote Co., 565 F.Supp. 843 (S.D.N.Y.1983)

Nosonowitz v. Allegheny Beverage Corp., 463 F.Supp. 162 (S.D.N.Y.1978)

Third Circuit

Boyer v. Snap-On Tools Corp., 913 F.2d 108 (3d Cir. 1990)

Fourth Circuit

Rinehart v. Consolidation Coal Co., 660 F.Supp. 1140 (N.D.W.Va. 1987)

Sixth Circuit

Bucksnort Oil Co. v. National Convenience Stores, 585 F.Supp. 883 (M.D. Tenn. 1984)

Saylor v. General Motors Corp., 416 F.Supp. 1173 (E.D.Ky. 1976)

Seventh Circuit

Poulos v. Naas Foods, Inc., 959 F.2d 69 (7th Cir. 1992)

Fields v. Reichenberg, 643 F.Supp.777 (N.D.Ill. 1986)

Eighth Circuit

Brown v. Southland Corp., 620 F.Supp. 1495 (E.D.Mo.1985)

Ninth Circuit

**McCabe v. General Foods Corp.*, 811 F.2d 1336 (9th Cir. 1987)

**Sessions v. Chrysler Corp.*, 517 F.2d 759 (9th Cir. 1975)

Frontier Airlines, Inc. v. United Air Lines, Inc., 758 F.Supp.1399 (D.Colo. 1989)

Tenth Circuit

Smoot v. Chicago, Rock Island & Pacific Railroad Co., 378 F.2d 879 (10th Cir. 1967)

Eleventh Circuit

Charest v. Olin Corp., 542 F.Supp.771 (N.D.Ala.1982)

Practical Considerations and Congressional Intent

Sears suggests that the rule on fraudulent joinder should be changed because the new one-year bar on removal will encourage unscrupulous plaintiff lawyers to engage in "illegitimate procedural tactics." However, the practical effect of Sears' suggestion is a proliferation of district court hearings on the motives and intentions of plaintiffs who join resident defendants to their cases. Under the Sears Rule, district courts would even be required to re-open remand hearings on the basis of

actions that occur years after remand is ordered. The 1988 Judicial Improvements and Access to Courts Act was intended to constrict diversity jurisdiction. The Sears Rule flies in the face of Congressional intent and replaces bright line rules with laborious use-by-case analysis.

The Hidden Agenda

The only conclusion that can be drawn from an examination of the 1988 Judicial Improvements and Access to Courts Act and of the jurisprudence of fraudulent joinder is that Sears has misrepresented the law. There is no conflict between the Fifth Circuit and the Supreme Court or the other circuits. There is no Congressional mandate to increase the number or the nature of removal hearings. What Sears really wants is a change in the law to make diversity jurisdiction easier to obtain. Barattini suggests that the place to accomplish tort reform is in Congress and urges the Court to decline Sears' invitation to judicial activism.

CONCLUSION

Following the plain meaning of 28 U.S.C. § 1446(b) and the 100-year-old jurisprudence of fraudulent joinder, the U.S. Court of Appeals for the Fifth Circuit properly remanded this case to the state courts of Louisiana. Respondent, Louis J. Barattini respectfully asks this

Honorable Court to deny Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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